91-346

FILED

AUG 27 1991

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1991

Talladega County Board of Education, Its Individual Members Dan Limbaugh, Gay Langley, Larry Morris, Beulah Garrett, Cindy Allred, And Its Superintendent Dr. Lance Grissett,

Petitioners,

v.

Quintin Elston, Et Al., On Behalf of Themselves And All Other Similarly Situated Black Children In Talladega County, Alabama,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In this school desegregation case, did the Court of Appeals depart from the "clearly erroneous" rule of Fed.R.Civ.P. 52(a) by vacating the trial court's findings of fact without holding they were clearly erroneous?

2. Did the Court of Appeals depart from the "harmless error" mandates of Fed.R.Civ.P. 61 and 28 USC 2111 by vacating the trial court's judgment for abuse of discretion, without explaining why the stated error was not harmless?

3. Does the Court of Appeals' judgment conflict with *Anderson v. Bessemer City*, 470 U.S. 564 (1985) and similar recent opinions of this Court, which carefully limit the power of a federal appeals court to disturb a trial court's findings of fact in a non-jury case?

4. Did the Court of Appeals depart from its own precedent for reviewing abuse of discretion issues?

5. Should the trial court's judgment be reinstated by this Court, since it rests on detailed findings of fact made after a three day non-jury trial, which were *not* found to be clearly erroneous by the Court of Appeals?

PARTIES TO THE PROCEEDING

All of the petitioners are listed in the caption.

In addition to the respondents listed in the caption, the following persons were plaintiffs in the trial court and appellants in the Court of Appeals, individually and on behalf of all other black children alleged to be similarly situated:

Darius, Kierston and Gwynethe BALL; Delicia, Loretta, Ronnie and Lecorey BEAVERS; Roslyn and Johnnie COCHRAN; Tiffanie, Augustus and Cardella ELSTON; Jerrok and Kate EVANS; Daniel, Althea, Vernon and Estella GARRETT; Kereyell and Delia GLOVER; Stephanie and Connally HILL; Ernest, Rayven, Rollen & Helen JACKSON; Carla, Dorothy, Bertha, Willie and Paul JONES; Danielle and Donald JONES; Datrea, Quinton and Willie MORRIS; Jeffrey and Lela MORRIS; Quinedell and Quinell MOSLEY; Tiffani, Kedrick, Terry, Donyae and Gwendolyn SWAIN; Cora, Louise, William and Veronica TUCK; Jacques TURNER: Wendell and John WARE; Montina, Richard and Angie WILLIAMS.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Talladega County Board of Education, its individual members and superintendent respectfully petition for a Writ of Certiorari from this Court to review the judgment of the United States Court of Appeals for the Eleventh Circuit, which vacated a final judgment of the United States District Court for the Northern District of Alabama in favor of the defendants in this school desegregation and civil rights case.

This case has national significance. The issue is whether there are any circumstances under which a court of appeals may avoid the "clearly erroneous" and "harmless error" standards of review by reversing on other grounds, without citing authority for its action, and without explaining why the perceived error was not harmless or why it resulted in clearly erroneous findings of fact.

OPINIONS AND ORDERS BELOW

The April 30, 1991 opinion of the Court of Appeals was designated by that Court as not for publication. It is reproduced in the Appendix at page A-1, and the order denying rehearing is reproduced at page A-27.

The District Court's findings of fact, conclusions of law, and judgment are reproduced in the Appendix beginning at page A-4.

JURISDICTION OF THIS COURT

The Court of Appeals issued its opinion vacating the District Court's judgment on April 30, 1991, and denied Petitioners' timely application for rehearing on June 7, 1991.

This Court has jurisdiction to review the judgment by certiorari under 28 USC Section 1254(1).

STATUTES AND RULES INVOLVED

1. Fed.R.Civ.P. 52(a) provides as follows:

"Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

2. 28 USC 2111 provides:

"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

3. Fed.R.Civ.P. 61 provides:

" . . . no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in

the proceeding which does not affect the substantial rights of the parties."

STATEMENT OF THE CASE

Like virtually every other school system in Alabama, the Talladega County Schools were made a party to the original statewide desegregation suit styled *Lee v. Macon County Board Of Education, et al.*, 267 F.Supp. 458 (MD Ala. 1967). The Talladega County Board Of Education ("The Board") was dismissed from that suit on March 13, 1985 by consent of the plaintiffs and the U.S. Dept. of Justice. The stipulation for dismissal acknowledged that the Board had achieved a unitary school system.

In 1987 the Board decided to build a new elementary school which would combine the elementary grades at three existing schools in the northern part of Talladega County. The plaintiffs opposed the new school location, and filed a motion to reopen the *Lee v. Macon* case as to Talladega County in July 1988. When this motion was denied, plaintiffs filed this suit claiming that (a) the location of the new elementary school was racially motivated, (b) the Board was allowing "zone jumping" (i.e. allowing students to attend public school out of their assigned attendance zones), and (c) that the Board had not implemented affirmative action plans regarding faculty and staff in its schools. The plaintiffs also made First Amendment and state claims based on the Board's alleged failure to provide them with copies of certain documents and allow them to make recordings of Board meetings.

Discovery was conducted in early 1989, and the District Court conducted a three day non-jury trial beginning on August 21, 1989. The trial court heard testimony from 18 witnesses, with numerous exhibits admitted into evidence.

On September 19, 1989 the District Court filed detailed findings of fact and entered judgment for the defendants. (Appendix p. A-4). The District Court found that:

(a) The plaintiffs failed to prove any of their claims, and the planned new school would provide a better education for all children attending it; (A-16, 17)

(b) That the new school's location was not racially motivated, had no disparate impact on blacks, and was " . . . consistent with the operation of a unitary, racially non-discriminatory public school system"; (A-17)

(c) That the Board neither allowed nor condoned "zone jumping"; (A-18) and

(d) That "even though defendants had no burden of proof, they have articulated and established by clear and convincing evidence substantial, legitimate, non-discriminatory reasons for the decisions and practices in question". (A-24).

In a one page order with no citation of authority, the Court of Appeals vacated the District Court's judgment on grounds that the trial court had abused its discretion. The Eleventh Circuit stated that the District Court should have granted the plaintiffs' motion for *pro hac vice* admission of two other attorneys shortly after the suit was

filed, and should have allowed the plaintiffs' untimely motion to add the Talladega City school system as an additional defendant.

The Eleventh Circuit's opinion did *not* state that the District Court's findings of fact were clearly erroneous, and gave *no* explanation as to why the perceived abuses of discretion were not harmless error, or why they had led to clearly erroneous findings of fact or an otherwise unjust result. (Appendix p. A-3).

BASIS FOR FEDERAL JURISDICTION

The district court had jurisdiction over this case pursuant to 28 USC Sections 1331 and 1343(4).

REASONS TO GRANT THE WRIT

In this case, a Court of Appeals has vacated findings of fact made by a District Court after a non-jury trial, without any holding that the facts found were clearly erroneous or that the perceived errors were not harmless. Like any other error in the trial court, reversal for abuse of discretion should be subject to the clearly erroneous and harmless error standards of appellate review. *Unless the District Court's factual finding of no discrimination was "clearly erroneous", then the abuse of discretion perceived by the Court of Appeals was necessarily "harmless error".*

During the trial, the district judge heard testimony from 18 witnesses, including one expert for the plaintiff, and received numerous exhibits from both parties. One of

the main issues was the Board's elementary school plan; during the trial the *plaintiffs'* expert admitted on cross-examination that this plan was " . . . a good plan . . . a pretty good plan".

After the trial, the district court entered detailed findings of fact concerning the plaintiffs' claims, and summarized its findings as follows:

> " . . . plaintiffs have failed to establish by a preponderance of the evidence that any of the challenged decisions and practices were tainted by a racially discriminatory animus. . . .
>
> . . . Even though defendants had no burden of proof, they have articulated and established by clear and convincing evidence substantial, legitimate, nondiscriminatory reasons for the decisions and practices in question. . . . "
>
> (Appendix p. A-24).

The Court of Appeals vacated the district court's judgment on grounds that it had abused its discretion, but without any discussion or citation of authority on why its reversal was not subject to the clearly erroneous or harmless error standards. The Court of Appeals' order did *not* state that any of the district court's findings were clearly erroneous, nor did it explain why the perceived errors were not harmless.

Fed.R.Civ.P. 52(a) severely limits the power of an appellate court to review or disturb facts found by a District Court sitting as the trier of fact. An appellate court must accept a District Court's finding of "ultimate fact" on the issue of discriminatory intent, and may not set that finding aside *unless* it is found to be clearly

erroneous. *Pullman-Standard v. Swint*, 456 U.S. 273, 285-287 (1982).

This Court's recent opinion in *Anderson v. Bessemer City*, 470 U.S. 564 (1985) emphasized that:

> "Rule 52(a) does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous."
>
> 470 U.S. at 574, citing *Pullman-Standard v. Swint*, 456 U.S. at 287.

Still more recently, in *Cooter & Gell v. Hartmarx Corp*, 496 U.S. ___, 110 L.Ed.2d 359 (1990), this Court stated:

> "In practice, the 'clearly erroneous' standard requires the appellate court to uphold any district court determination that falls within a broad range of permissible conclusions. [Citing *Anderson v. Bessemer City*, supra].
>
> . . . If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous; [Citing *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844 (1982)].
>
> *. . . When an appellate court reviews a district court's factual findings, the abuse of discretion and clearly erroneous standards are indistinguishable: A court of appeals would be justified in concluding that a district court had abused its discretion in making a factual finding only if the finding were clearly erroneous."*

> 496 U.S. at ___, 110 L.Ed.2d at 378-379 (Emphasis added).

It might be argued that the Eleventh Circuit did not actually review or set aside the trial court's findings of fact in this case, but merely vacated its judgment and remanded for further proceedings. Such an argument would ignore the obvious point that the trial court's judgment was clearly based on the ultimate finding of fact that no defendant was guilty of any racially discriminatory motives or actions as charged in the complaint. The Eleventh Circuit necessarily had to vacate the District Court's findings of fact to remand for further proceedings, because if those factual findings were accepted then the defendants were entitled to judgment in their favor.

If the Court of Appeals had found any of the District Court's factual findings to be clearly erroneous, then it presumably would have said so and explained why. The Court of Appeals' failure to discuss a clearly erroneous analysis suggests that application of this standard would not have allowed reversal.

It might also be argued that reversal was proper because the perceived abuse of discretion affected the facts which the plaintiffs could present or the actual trial itself. This argument is met head-on by the harmless error rule of Fed.R.Civ.P. 61:

> "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to

> take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceedings must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties".

In the same way, 28 USC 2111 requires an appellate court to " . . . give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

The commands of Rule 61 and 28 USC 2111 are as clear as those of Rule 52, and perhaps more so. As this Court emphasized in *McDonough Power Equipment v. Greenwood,* 464 U.S. 548 (1984)

> "The harmless error rules adopted by this Court and Congress embody the principle that courts should exercise judgment in preference to the automatic reversal for "error" and ignore errors that do not affect the essential fairness of the trial . . . While in a narrow sense Rule 61 applies only to the district courts, . . . it is well settled that the appellate courts should act in accordance with the salutary policy embodied in Rule 61. [citations omitted]. Congress has further reinforced the application of Rule 61 by enacting the harmless-error statute, 28 USC 2111, which applies directly to appellate courts and which incorporates the same principle as that found in Rule 61. [Citing *Tipton v. Socony Mobil Oil Co.,* 375 U.S. 34, 37 (1963) and *U.S. v. Borden Co.,* 347 U.S. 514, 516 (1954)]."
>
> 464 U.S. at 553-554.

As this Court recently stated in *United States v. Lane,* 474 U.S. 438 (1986):

> "Since *Chapman* [*v. California,* 386 U.S. 18 (1967)], we have consistently made it clear that it is the

> duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations."
>
> 474 U.S. at 445.

If denial of the plaintiffs' motions for additional attorneys and to add a defendant in some way affected the essential fairness of the trial, the Eleventh Circuit would have undoubtedly offered some explanation or example to support reversal and illustrate why the error was not harmless. The lack of such explanation, as with the lack of a clearly erroneous analysis, suggests that the Court of Appeals simply wished to reverse but had no firm ground on which to do so.

The argument that a court of appeals has inherent supervisory power to correct procedural and trial errors by a district court without regard to the harmless error rule was rejected by this Court in *Bank of Nova Scotia v. U.S.*, 487 U.S. 250 (1988). This was a criminal case involving Fed.R.Crim.P. 52(a), which contains the same harmless error rule as Fed.R.Civ.P. 61 and 28 USC 2111. This Court stated there:

> " . . . Rule 52(a) provides that 'any error, defect, irregularity or variance which does not affect substantial rights must be disregarded.'
>
> . . . federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions. The balance struck by the Rule between societal cost and the rights of the accused may not casually be overlooked because a Court has elected to analyze the question under the supervisory power."

487 U.S. at 255, citing *U.S. v. Payner*, 447 U.S. 727, 736 (1980).

This Court's opinions are very clear that no district court judgment may be reversed for any reason, whether abuse of discretion or otherwise, without a showing that the error affected the essential fairness of the trial, *and* (if a non-jury case), resulted in clearly erroneous findings of fact. Rule 52(a) requires appellate courts to give the same deference to a district court's findings when it sits as the trier of fact as the Seventh Amendment requires in jury cases.

Finally, it might be argued that the Court of Appeals implicitly considered the clearly erroneous and harmless error rules even though its opinion did not expressly say so. This would overlook the fundamental obligation of a reviewing court to explain both the standard of review it applies and the basis for its reasoning. Without such explanations, this Court would have no way of assuring that the courts of appeal were uniformly and consistently adhering to the proper standards of review.

Besides departing from the recent opinions of this Court, the Eleventh Circuit's opinion in this case departed from its own precedent for reviewing abuse of discretion issues. In numerous recent decisions, the Eleventh Circuit has stated that " . . . a showing of prejudice is necessary for the Court to find an abuse of discretion". *U.S. v. Loyd*, 743 F.2d 1555, 1564 (11th Cir. 1984). Likewise in *U.S. v. Magdaniel-Mora*, 746 F.2d 715, 718 (11th Cir. 1984), Judge Vance wrote that in order to establish an abuse of discretion the defendant must show that he was " . . . unable to receive a fair trial and . . . suffered compelling prejudice against which the trial court could

offer no protection". And in *U.S. v. Gabay*, 923 F.2d 1536 (11th Cir. 1991) the Eleventh Circuit stated that a trial court had " . . . broad discretion in handling a trial" and that an appellate court . . . will not intervene absent a clear showing of abuse".

Although the plaintiffs argued abuse of discretion in their brief, they made no attempt to show how they had been denied a fair trial as a result of the alleged abuse of discretion, or how the outcome of the case would probably have been different, or how the ostensible abuse led to factual findings that were clearly erroneous. (See p. 53-55, "Brief for Appellants", dated May 4, 1990, Appendix p. A-30). The Eleventh Circuit's opinion contained no discussion or explanation of how the plaintiffs had carried their burden of showing a clear abuse of discretion or why they had suffered substantial prejudice as a result of the alleged errors.

The trial court's judgment in this case was supported by detailed findings of fact, entered after hearing testimony from eighteen witnesses and considering numerous exhibits. The plaintiffs' own expert admitted that the challenged elementary school plan was "good . . . pretty good". The District Court's judgment clearly falls within the "broad range of permissible conclusions" referred to by this Court in *Cooter & Gell v. Hartmarx*, and is more than plausible in light of the record as a whole. Under these circumstances, this Court should reverse the judgment of the Court of Appeals and reinstate the judgment of the District Court.

CONCLUSION

The Court of Appeals effectively vacated the District Court's findings of fact while ignoring the clearly erroneous and harmless error standards of review.

This case presents the Court with the opportunity to emphasize once more that the power of federal appeals courts to disturb the findings of a district court is very limited, and may not be exercised for any reason without application of the clearly erroneous and harmless error rules.

The judgment of the Court of Appeals should be reversed, and the District Court's judgment reinstated.

Respectfully submitted,

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APPENDIX 1

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 89-7777

D. C. Docket No. CV-88-H-2052-E

QUINTIN ELSTON; RHONDA ELSTON; and TIFFANIE ELSTON, all minor children, by and through their parents and guardians, AUGUSTUS ELSTON, and CARDELLA ELSTON; on behalf of themselves and all other similarly situated black children and parents or guardians of black children in Talladega County in the State of Alabama, etc., et al.,

Plaintiffs-Appellants,

versus

TALLADEGA COUNTY BOARD OF EDUCATION; LANCE GRISSETT; DAN LIMBAUGH; M. R. WATSON; GAY LANGLEY; and LARRY MORRIS and BEULAH GARRETT;

Defendants-Appellees.

JOSEPH POMEROY,

Defendant.

89-7917

TORRANCE BECK, a/k/a
Albert Beck, Jr.,

Plaintiff,

QUINTIN ELSTON, RHONDA ELSTON, and TIFFANIE ELSTON, all minor children, by and through their parents and guardians, AUGUSTUS ELSTON and CARDELLA ELSTON; on behalf of themselves and all other similarly situated black children in Talladega County in the State of Alabama,

Plaintiffs-Appellants

versus

TALLADEGA COUNTY BOARD OF EDUCATION; LANCE GRISSETT; DAN LIMBAUGH; M. R. WATSON; GAY LANGLEY; LARRY MORRIS; and BEULAH GARRETT,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Alabama

(April 30, 1991)

Before TJOFLAT, Chief Judge, DUBINA, Circuit Judge, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

Appellants' appeal from the district court's judgment in favor of the appellees on appellants' claims under Title

VI, Title VII and the equal protection clause of the fourteenth amendment.

During proceedings in this case, the district court denied the appellants' motion to add the Talladega City Board of Education as a party defendant and also denied a motion for admission pro hac vice of two attorneys for the appellants from the NAACP Legal Defense Fund. We find that the district court abused its discretion in denying these motions.

Accordingly, we vacate the judgment of the district court and remand this cause with directions to the district court to grant the motion for leave to amend, grant the motion for admission pro hac vice, permit such additional discovery as may be necessary and conduct such additional evidentiary hearings as determined appropriate by the court.

VACATED and REMANDED with directions.

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA EASTERN DIVISION

QUINTIN ELSTON, ET AL., PLAINTIFFS, VS. TALLADEGA COUNTY BOARD OF EDUCATION, ET AL., DEFENDANTS.	)	CV88-H-2052-E (Filed Sep 19, 1989)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action was tried before the court, without the aid of a jury, on August 21, 22 and 23, 1989. The matter is now under submission and the court herein sets forth its findings of fact and conclusions of law. Pursuant to the Pretrial Order, counsel for the parties filed with the court on August 11, 1989 a statement of agreed and disputed facts. The court's findings of fact and conclusions of law are basically addressed to the proposed facts contained in that document in the order and under the headings set forth therein.

Stipulated Facts

In 54 separately numbered paragraphs the parties stipulated a number of facts and each of those stipulated facts are accepted by the court as facts for the purposes of this action. The court does, however, note that at least

one of those stipulated facts may not be correct but any error is relatively immaterial. In paragraph 13 of the stipulated facts, counsel stipulated that defendants' plan for the students currently residing in Jonesview and Talladega County Training School zones to attend Talladega County Training School for grades 7 through 12. Defendant Lance Grissett has such plan and will recommend such to the Board of Education but the Board of Education has not formally approved such plan.

Plaintiffs' proposed factual findings

In 44 separately numbered paragraphs counsel for plaintiffs presented to the court proposed factual findings. The court will now set forth, using the same paragraph numbers, some of its findings of fact and conclusions of law germane to each proposed factual finding. The failure to include the language or the "facts" as proposed by counsel for plaintiffs could generally be viewed as a determination by the court that the proposed language or "facts" have not been established or are embraced in other findings or conclusions found elsewhere in this document.

1. Defendants plan to discontinue grades K-6 at Jonesview (an historically white school) and at Talladega County Training School (an historically black school) and to relocate those grades at the site of the former Idalia School (which burned in 1986) in a new school building which will house grades K-6 from the three school zones.

2. Black parents have contributed significant time and financial resources to support and enhance the

Talladega County Training School. Despite these contributions and the expenditures by the Board of Education for maintenance and improvements over the years, the Training School, like other schools in the system, has generally deteriorated. A renovation and rebuilding program has been underway for several years and Talladega County Training School is slated for substantial renovation in the immediate future. Several historically white schools are not as far along as Talladega County Training School in the renovation plans.

3. Assignment of all students from the new school to the Talladega County Training School for grades 7-12 would add about 135 white students to the Training School which would significantly improve integration at the Training School. About 55 of those students would come from Jonesview Elementary School zone and approximately 80 would be supplied by Idalia Elementary School zone. While it seems clear the Jonesview students will be so assigned, the Board has not made a decision as to where the Idalia students will be assigned.

4. Although the Board has never formally voted to close the elementary section of the Talladega County Training School or voted to close Jonesview Elementary school, when the Board approved the construction of the new 500 pupil school to be known as Stemley Bridge Road Elementary, implicit in that decision was the closure of Jonesview and the elimination of elementary grades at the Talladega County Training School.

5. The Talladega County Board of Education has not finalized where students attending the new school who currently live in the Idalia School zone will go for grades

7-12, but the Superintendent presently intends to recommend that many of them attend Drew Middle School for grades 7-8 and Lincoln High School for grades 9-12 which are the schools those students have historically been zoned to attend.

6. Defendants plan to renovate the Talladega County Training School for use as a 7-12 facility. As of June 1988, the estimated expenditure on renovation for the Training School was $500,000.

7. The construction of a new school at the site adjacent to the Idalia School, originally estimated to cost about $1,200,000, later estimated to cost $1,800,000, is now anticipated by defendants to cost almost $2,600,000.

8. The plan to renovate all buildings at the Training School for use in the operation of a grades 7-12 school would cost essentially the same whether the new elementary school is located there or elsewhere. The cost of construction of a new school building containing about 53,000 gross square feet for use as a K-6 grade school for about 550 students would be approximately the same whether constructed at the Idalia or at the Talladega County Training School site.

9. In 1988 the Board relocated the Phyllis Wheatley Middle School, which historically was a black school, to a new facility about a mile from its former site. Although its name was changed to Childersburg Middle School, its attendance zones, faculty and bus routes did not change. The composition of the student body remained the same.

10. Some black parents, including Mr. Charles Woods (a local leader), objected to moving the Wheatley

School to the new location and changing the name. Mr. Woods believed the plan was racially motivated and part of a pattern of closing historically black schools. He asked to be allowed to meet with the Talladega County Board of Education to express his opposition to the moving of Phyllis Wheatley but was not successful in arranging such a meeting.

11. Under the terms of a resolution adopted November 22, 1983 by the Talladega County Board of Education and filed in this court in *Lee v. Macon County* prior to the March 13, 1985 "unitary" order, the Board committed itself to maintaining a unitary, nondiscriminatory school system. There is no evidence that it has violated this commitment since March 13, 1985; and the court is satisfied that the Board's actions and decisions challenged in this suit do not violate that commitment.

12. Prior to the March 13, 1985 order (a) determining that the Talladega County School System had attained unitary status and (b) dismissing the Talladega County Board of Education from the *Lee v. Macon County* litigation, the Board decided to close Hannah Mallory Elementary School, a 100% black school with grades K-6, at the end of the school year 1984-85. A formal "closure" resolution was adopted in the summer of 1985.

13. When the Hannah Mallory School was closed after the 1984-85 school year, the Hannah Mallory attendance zone was divided among three attendance zones primarily on a proximity basis. Prior to the March 13, 1985 unitary order, defendants had submitted to the Department of Justice the proposed closing of Hannah Mallory and the anticipated distribution of its students as

actually distributed. The plan envisioned assigning the 132 black students at Hannah Mallory as follows: 26 – Childersburg; 26 – Jonesview; 80 – Talladega County Training School. Childersburg zone, Jonesview zone and Talladega County Training zone all received the Hannah Mallory students, all of whom were black.

14. As a result of the zoning changes made in 1985 when Hannah Mallory was closed, about 132 black students were reassigned to the three zones earlier mentioned. The following school year, as a result of a combination of those assignments and natural or normal enrollment fluctuations, black student enrollments in grades K-6 in the three receiving school districts increased as follows: Jonesview went from 85 to 116; Childersburg went from 134 to 147; and Talladega County Training went from 134 to 236.

15. This increase crowded the facilities at the Training School and required the use of some portable classrooms. Disbursement of the Hannah Mallory students among the three receiving zones promoted integration in the Childersburg zone, adversely affected integration in the Jonesview zone and had no significant effect on integration at Talladega County Training School. The increased concentration of black students at the Training School makes it more difficult to desegregate the Training School, but the planned new school will dramatically improve the black-white ratio for the students who currently attend grades K-6 at the Training School. Those students currently are in an environment which is 99% black and will be in an environment that is 70-75% black.

16. This proposed fact has not been established.

17. This proposed fact has not been established.

18. The additional K-6 zone that was created for the Training School following the closure of Hannah Mallory is not contiguous with the original Training School K-6 zone and in this respect it is unique; but the K-6 zone is contiguous to a then existing Training School 7-12 zone.

19. There is property adjacent to the Talladega County Training School which if acquired by gift, purchase or condemnation, would have been suitable for expansion. This includes property owned by members of the Dumas family and the Lawson family. A minimum of 15 acres were needed for the new school and the Board ultimately was able to acquire for the new school 48 acres at the Idalia site in October of 1987.

20. Inquiries in the spring of 1988 made to a representative of the Dumas property owners by the principal of the Talladega County Training School, Mr. John Stamps, caused Mr. Stamps to conclude and to report that the Dumas owners after resolving a boundary line problem with the Board, might be receptive to offers to purchase or swap land and might even donate some property to the school. The Dumas representative seemed particularly concerned that a portion of their land might be across the road and was being used by the school as school land. All of this took place *after* the Board of Education had acquired a 48 acre site at Idalia and made the decision to build the new school at the Idalia site and also after including funds for construction of the new school in the bond issue authorized December 1, 1987.

21. In 1988, Mr. Stamps inquired of a representative of the Lawson family whether it would consider the sale of about 6 acres of property adjacent to the school. This was adjacent to the football field and was not a suitable site for a new school facility. The representative reported that if absolutely necessary, the family might consider a sale. This conversation also took place after the Board had acquired the 48-acre site at Idalia.

22. There is no evidence that the Board sought opinions from parents, black or white, of students to be affected by the decision to create a single large elementary school to serve the Jonesview, Talladega County Training and Idalia zones. Board meetings, however, have been open to all parents and interested persons. The Board sets aside a portion of each meeting to receive comments, complaints, etc., from members of the public in attendance.

23. On January 21, 1988, Mr. Augustus Elston wrote Superintendent Grissett noting that concerned parents with children in attendance at Talladega County Training High School were requesting permission to be heard at the next meeting of the Talladega County Board of Education. The letter stated that "[t]here are many items of grave concern that we need to discuss." This letter was also sent to the other Board members. The next day the Superintendent of the Board wrote to Elston, referring him to Principal Stamps and saying he (the Superintendent) would be glad to meet with Mr. Elson, if necessary. This letter was followed up by a telephone call from Principal Stamps to Mr. Elston.

24. On January 27, 1988, Mr. Elston again wrote to Dr. Grissett requesting that concerned parents of Talladega County Training High School be allowed the opportunity to be heard at the next Board meeting. The letter requested that if the parents were not following the proper channels to get on the agenda, that they be informed of the correct procedure. Copies were sent to the other Board members. No response to this letter was made by any Board member or Dr. Grissett.

25. On February 9, 1989, Mr. Elston wrote to Dr. Morris, Chairman of the Talladega County Board of Education, complaining about an atmosphere of racism and racially prejudiced occurrences, and expressed concern that the Training School had been marked for closure and been excluded from recent planning for facility improvements. Four days later the Chairman of the Board of Education responded, specifically referring to the Talladega City Training School concerns and welcoming them to a Board meeting to voice any concern. Mr. Elston attended the next Board meeting but when the time set aside to receive public comments arrived, Mr. Elston did not speak up. Mr. Elston explains this silence by his belief that it was too late in the meeting for the Board properly to consider his concerns.

26. This proposed fact has not been established.

27. On June 23, 1988, the Board, through its counsel, informed counsel for some of the plaintiffs in writing that the new school would accommodate students currently enrolled in the Idalia School and the "surrounding area" and that the attendance zone for the new school "could"

include students from Lincoln Elementary and the Training School. The Board, through its counsel, reported that it had no plans to change the use of the Jonesview Elementary School. No evidence was presented to the court which sheds light on this incorrect information in such correspondence.

28. With respect to the May 1988 request for state facilities surveys referenced in paragraph 35 of the Stipulated Facts, the Board, through its counsel, informed counsel for plaintiffs that when the Board received the facilities reports, a copy would be made available.

29. This proposed fact has not been established.

30. Significant numbers of white students who reside within the Talladega County Training School zone attend public schools in the Talladega City School system. This has occurred for many years and occurred long before the March 13, 1985 "unitary" order.

31. Dr. Grissett has not contacted school officials of the Talladega City School system in an effort to stop it from accepting into its system children who reside in the Talladega County Training School zone.

32. This proposed fact has not been established.

33. On April 19, 1979, the Justice Department notified counsel who represented both the Talladega City Board of Education and the Talladega County Board of Education that the Talladega City School system was governed by a provision in its school desegregation order that it should not consent to transfers where the cumulative effect would reduce desegregation in either district.

34. As required by state law, defendants have transferred school records of students leaving the Talladega County School system after they have enrolled in the Talladega City School system.

35. The Talladega County School system does not have a written policy regarding verification of residences of students seeking to enroll in County schools. It does seek to verify the residences of students in its system transferring to another school in its system.

36. Defendants are aware of zone-jumping by white and black students alike. Many of the white students are likely avoiding historically black Talladega County Training School. One of the objectives in building the new Stemley Bridge Road Elementary School was to discourage such zone-jumping; another of such objectives was to foster and promote integration of children in the three affected zones.

37. This proposed fact has not been established.

38. If there is any significant zone-jumping *within* the County system by students avoiding the Training School, no evidence sufficient to reach that conclusion has been presented.

39. The Board of Education provides transportation to students who attend school in the County system and it is possible for some students to use that transportation to attend an incorrect school.

40. The Talladega County Board of Education may have received an inquiry in 1984 by the Justice Department regarding possible zone-jumping by students avoiding historically black Hannah Mallory School and the

Talladega County Training School. The extent of any such zone-jumping in 1984 is not known.

41. About ten years ago, when a portion of the Talladega County school district was sought to be annexed by a school system in another county, the Board took steps in *Lee v. Macon County* to stop the annexation. The area sought to be annexed contained mostly white students and both the school systems involved were under court ordered integration. The Board has taken few, if any, steps to stop the loss of white students to the separate school systems operated by the City of Talladega or the City of Sylacauga from predominately and historically black Talladega County Training School.

42. The Talladega County Board's policy authorized majority-to-minority transfers.

43. The Talladega County Board has not advertized [sic] the availability of the majority-to-minority transfer option.

44. One of the members of the Talladega County Board was recently asked and did not know what a majority-to-minority transfer is.

Facts to be offered by proffer

The document filed August 11, 1989 contain 10 paragraphs setting forth "facts" which counsel contemplated would be offered to the court by a proffer. No proffer was made during the trial and that section of the August 11, 1989 document will not be addressed by the court.

Defendants' proposed factual findings

In 24 separately numbered paragraphs counsel for defendants presented to the court proposed factual findings. The court will now set forth, using the same paragraph numbers, some of its findings of fact and conclusions of law germane to each proposed factual finding. The failure to include the language or the "facts" as proposed by counsel for defendants could generally be viewed as a determination by the court that the proposed language or "facts" have not been established or are embraced in other findings or conclusions found elsewhere in this document.

1. Plaintiffs have failed to establish their entitlement to prevail or obtain relief under any of the claims they have made in their complaint.

2. There has been no significant or material change in the percentage of white and non-white students attending schools operated by the Talladega County Board of Education during the past 15 years.

3. The Talladega County schools were under the supervision of the United States District Court from 1970 until March 13, 1985.

4. The Talladega County Board of Education was dismissed from the *Lee v. Macon County* litigation on March 13, 1985 by consent, the court expressly concluding that the system had achieved a unitary status.

5. The closing of Jonesview School, the elimination of grades K-6 at Talladega County Training School, and the consolidation of all those students with students in

the Idalia zone at a new facility under construction adjacent to and on the north side of the old Idalia site is consistent with the operation of a unitary, racially nondiscriminatory public school system. The anticipated zones for the students when they reach grades 7-12 are also consistent with such an operation.

6. The decision to build the new Stemley Bridge Road Elementary School now under construction has not been shown to have been racially motivated. Its construction will provide better educational opportunities for all of the children it serves. Construction of the new Stemley Bridge School will enhance desegregation of grades K-6 at the present Talladega County Training School, since it will take students who are now in an environment about 99% black and change that ratio to about 70-75% black.

7. The Board was reasonable in assuming that the Lawson family which owns much of the land around the present site of the Talladega County Training School likely would not sell land to the Board. At one point in the past, the patriarch of the family is reputed to have told a former Board member that he would "freeze in hell" before he would sell another piece of land to the County. Regardless of whether land might have been available at the Talladega County Training School site, the Board made a sound decision from an educational viewpoint not to locate the new elementary school at the site of a middle school/high school. This decision did not have a racially discriminatory animus and did not have a disparate impact on blacks.

8. The plaintiffs have not shown that the location of the new Stemley Bridge Road School was racially motivated or effected a disparate impact on blacks.

9. Talladega County Training School is not scheduled for closing, but is scheduled for substantial renovation and upgrading so that it may serve as an expanded grades 7-12 school. The capital outlay for the improvements will equal or exceed $500,000.

10. The Talladega Board of Education neither "allows" nor "condones" out-of-zone attendance, or "zone-jumping" by a child residing within its system but attending a public school outside its system. The Board has a significant financial interest in discouraging such zone-jumping. The Board also has a general policy against a child zoned for one of its schools attending one of the Board's schools out of his/her zone, but it has two reasonable exceptions to this policy, viz., children of employees of the Board may attend in the zone of a parent's employment and children in need of special education may attend out-of-zone. No evidence even suggests that these exceptions are abused or applied along racial lines, and it is clear the Board takes steps calculated to assure that a child in its system attends the proper school. Talladega County School personnel have been aware for quite some time that students of both races, but primarily white students, who are zoned for Talladega County schools such as Talladega County Training School are attending schools in the Talladega City system and the Sylacauga City system. Talladega County school personnel are, as a practical matter, unable to prevent this, since the enrollment and attendance of a public school student is verified and determined by the gaining school system (i.e., the city school system) and not by the losing school system (in this case, Talladega County). Talladega County loses approximately $2,000 to $3,000 (depending

upon the year) of state education money per child per year for every "county" student who attends a "city" system school.

11. Talladega County school personnel have previously attempted to bring the problem discussed in paragraph 10 above to the attention of the Federal Bureau of Investigation and the United States Justice Department, but nothing has happened.

12. Only one historically black school (Hannah Mallory) has been closed since 1970. One historically white school (Eastoboga) has also been closed during that period and another historically white school (Jonesview) is currently in the process of being closed.

13. At the end of the 1987-88 school year, the Phyllis Wheatley School, with the support of some members of the local black community and over the objections of other members of the local black community, was relocated to a new site about one mile away. The relocation of Phyllis Wheatley School did not change the bus route, faculty, or student composition in any way. The name of the school was changed to Childersburg Middle School.

14. In 1985 Hannah Mallory was the only remaining one-race school in Talladega County. It had been allowed to remain that way during the entire time the school system was operating under its *Lee v. Macon County* integration order primarily because of the school's geographical location and the difficulty of integrating it.

15. The trend in modern public education is to consolidate smaller "neighborhood" schools into larger ones with more diverse student bodies and better facilities.

The new Stemley Bridge Road School is in line with this trend, and it will make modern, up-to-date facilities available to a large number of children in grades K-6. Its student body will be 70-75% black.

16. There were two principal logistical problems with locating the new larger elementary school at the site of Talladega County Training School: (1) adequate land consisting of a minimum of 15 acres was not readily available, and (2) the Board needed the existing space at Talladega County Training School embracing about 55,000 square feet for its planned upgrade of that school and the enhanced grades 7-12 program it now has planned. The Board also had a strong desire not to locate the large, consolidated elementary school at the site of a middle school or a high school.

17. The new Talladega County Training School building program will include an up-to-date library, a media center embracing a computer lab, and the addition of adequate science laboratory space. It will also include greatly expanded home economics and industrial arts programs and facilities. The remodeling program also includes substantial physical improvements, such as re-wiring, re-lighting, replacement of all windows and doors, etc.

18. By expanding and upgrading the facilities at Talladega County Training School to enhance the education offered to grades 7-12 there, the Board hopes to be able to improve its course offerings and attract and retain more white students to improve racial balance at Talladega County Training School. Regardless of how effective this upgrade is in attracting more students to that

school who are now going to private schools or to adjoining public systems, the planned renovation at Talladega County Training School will unquestionably improve the quality of education for students now attending there.

19. The Talladega County Board of Education has moved forward to improve the quality of education offered to all of its students since March 13, 1985. In so doing there is no evidence which can support a conclusion that race impermissibly was considered in the decision-making process. There was no discriminatory animus behind the plans and decisions challenged in this case and it is clear that the challenged plans and decisions have had no disparate impact on blacks.

20. It is clear to the court that over the years the Board has delayed providing to the public, black and white alike, information with regard to developments under consideration by the Board, but there is no evidence that this has been done in a racially discriminatory manner or with a racial animus. The Board has not refused to receive comments or input from plaintiffs at Board meetings or otherwise.

21. Mr. Elston wrote a total of three or four letters to Talladega County school personnel, but all of those letters were vague and he never made any follow up about what his "concerns" were. In all but one instance the Board properly responded to such letters. The court is particularly impressed with the restrained response (Plaintiffs' Exhibit 4) to one of such letters (Plaintiffs' Exhibit 5). Neither Mr. Elston nor any other plaintiff who attended a Board meeting asked to speak to the Board meeting about

any of the "concerns" which they have raised in the complaint.

22. The extent of the "zone-jumping" in which Talladega County students are attending Talladega City or Sylacauga City schools is not known, but it involves a significant number of students, most of which are white but some of which are black. Any such jumping does not appear to have changed significantly over the years the racial composition of the students in the Talladega County system or the Talladega City system. Talladega County system enrollment has remained about constant at 43% black and Talladega City system enrollment has moved in recent years from 40% black to 43% black notwithstanding the City's receipt of students who reside outside the City. Many of the students who are or have been attending Sylacauga City Schools have done so under "temporary guardianship" or similar court orders which could well have been devices to permit their attendance at Sylacauga City Schools. There is no evidence that the orders are fake and it seems that each such order was signed by a state court judge with appropriate jurisdiction. With regard to each of these "receiving" systems, the Talladega County Board has few, if any, avenues available to it to stop this drain from its system other than to discourage it by improvements to its system, such as the improvements out of which this suit arose. Certainly it is clear that the Board would like to stop the zone-jumping. The Board is in no way intending to discriminate against plaintiffs on the basis of race or to deny plaintiffs equal protection by not being more "creative" in finding a way to prevent such zone-jumping.

23. The Talladega County School System has not "notified parents of children going out of zone" to another public school system that their actions are improper. Defendants' view that it has no legal right or duty to do so is a sincere view with a reasonable basis to support it. Transferring school records, in accordance with state law requirements, of students leaving the County system for the City system does not make the defendants accountable for the conduct of the parents and the receiving school officials. Any "zone-jumping" *among* or *between* zones in the County school system is very limited, not authorized by the defendants, includes black as well as white students, and is largely corrected through the Board's policy of requiring the receiving principal to investigate transfers within the County's system.

24. One of the purposes, and hopefully one of the results of the upgrading and enhancement of Talladega County Training School grades 7-12 is to stop the loss of white students by providing attractive physical facilities and curriculum changes at Talladega County Training School.

Summary

In this case plaintiffs have endeavored to establish that several decisions and practices of defendants violate or violated (a) the Equal Protection Clause of the Fourteenth Amendment, (b) Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*, and (c) regulations promulgated to effectuate Title VI, 34 C.F.R. §100 *et seq.*, and particularly 34 C.F.R. § 100.3. They have failed in this

endeavor. With regard to all such claims, plaintiffs have failed to establish by a preponderance of the evidence that any of the challenged decisions and practices were tainted by a racially discriminatory animus. A discriminatory intent being a prerequisite to recovery under the constitutional claim and the statutory claim, defendants are entitled to a judgment in their favor on these claims. Also, to the extent that plaintiffs sought to prevail on disparate *treatment* theories under their claims predicated on regulations to effectuate Title VI, defendants are entitled to a judgment in their favor. With regard to the claims based on disparate *impact* theories under the regulations to effectuate Title VI, plaintiffs have failed to establish by a preponderance of the evidence that any of the challenged decisions and practices violated the regulations or otherwise had a disparate impact on blacks. Thus plaintiffs have not established even a prima facie case under the regulations. Even though defendants had no burden of proof, they have articulated and established by clear and convincing evidence substantial, legitimate, non-discriminatory reasons for the decisions and practices in question. Since the court has earlier held that the decisions and practices of defendants did not result in a disparate impact on plaintiffs, it goes without saying that plaintiffs also failed to establish an alternative to the challenged decisions and practices which alternative would have resulted in less of a disparate impact.

A separate final judgment in favor of defendants will be entered.

DONE this 19th day of September, 1989.

/s/ James H. Hancock
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

QUINTIN ELSTON, ET AL.,	)	
PLAINTIFFS,	)	CV88-H-2052-E
VS.	)	Filed
TALLADEGA COUNTY BOARD OF EDUCATION, ET AL.,	)	Sep 19, 1989
DEFENDANTS.	)	

FINAL JUDGMENT

In accordance with the findings of fact and conclusions of law this day entered, it is hereby ORDERED, ADJUDGED and DECREED that judgment in favor of defendants is ENTERED. Costs are taxed against plaintiffs.

DONE this 19th day of September, 1989.

/s/ James H. Hancock
UNITED STATES
DISTRICT JUDGE

APPENDIX 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-7777

QUINTIN ELSTON; RHONDA ELSTON; and TIFFANIE ELSTON, all minor children, by and through their parents and guardians, AUGUSTUS ELSTON, and CARDELLA ELSTON; on behalf of themselves and all other similarly situated black children and parents or guardians of black children in Talladega County in the State of Alabama, etc., et al.,

Plaintiffs-Appellants,

versus

TALLADEGA COUNTY BOARD OF EDUCATION; LANCE GRISSETT; DAN LIMBAUGH, M. R. WATSON; GAY LANGLEY; AND LARRY MORRIS and BEULAH BARRETT;

Defendants-Appellees,

JOSEPH POMEROY,

Defendant.

No. 89-7917

TORRANCE BECK, a/k/a
Albert Beck, Jr.,

Plaintiff,

QUINTIN ELSTON, RHONDA ELSTON, and TIFFANIE ELSTON, all minor children, by and through their parents and guardians, AUGUSTUS ELSTON and CARDELLA ELSTON; on behalf of themselves and all other similarly situated black children in Talladega County in the State of Alabama,

Plaintiffs-Appellants,

versus

TALLEDEGA COUNTY BOARD OF EDUCATION; LANCE GRISSETT; DAN LIMBAUGH; M. R. WATSON; GAY LANGLEY; LARRY MORRIS; and BEULAH GARRETT,

Defendants-Appellees.

Filed June 7, 1991

Appeals from the United States District Court for the Northern District of Alabama

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ON PETITION(S) FOR REHEARING

BEFORE: TJOFLAT, Chief Judge, DUBINA, Circuit Judge, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by appellant's is denied.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

* * *

715, 725-26 (1966).

V. THE DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO JOIN THE TALLADEGA CITY BOARD OF EDUCATION AS A PARTY

After learning in depositions in early May that interdistrict transfers to the Talladega City schools were significant and documented and that the County School Board relied exclusively on an argument that it was beyond their power to prevent County students from attending the City schools, plaintiffs moved on May 25, 1989 to join the City Board as a party in the litigation (R1-62). Defendants did not object.

The district court denied the motion solely because it was beyond the May 5 deadline that the court set directing that the "parties to the litigation . . . shall be reflected by the pleadings on file" on May 5, 1989 (R1-63).

Plaintiffs contend that the court abused its discretion here by exercising it in a manner directly contradictory to Fed. R. Civ. P. 21, which specifically permits a party to be dropped or added "at any stage of the action." Fed. R. Civ. P. 21.[71] A request to add parties is generally denied when it is so late in the litigation that it will delay the

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[71] Parties have been added on appeal, *Reed v. Robilio*, 376 F.2d 392 (6th Cir. 1967), after trial, *Reichenberg v. Nelson*, 310 F. Supp. 248 (D. Neb. 1970), and in the Supreme Court, *Rogers v. Paul*, 382 U.S. 105 (1965); *Mullaney v. Anderson*, 342 U.S. 415 (1952).

case or prejudice any of the parties to the action, Wright, Miller & Kane, *Federal Practice & Procedure*, § 1688 at 467-69 (1986); however, that was not the case here.

Here the date was arbitrarily set at the outset of the litigation; defendants did not object to the addition or claim prejudice; the request was only 20 days after the Court deadline; discovery was ongoing and not completed until shortly before trial in August; all the discovery necessary with respect to Talladega City was also necessary for the claim against the County and was taken anyway. Courts routinely add surrounding school districts in interdistrict transfer cases.[72] Substantial case law supports joining parties to existing litigation where the party sought to be joined could frustrate or interfere with the relief granted by the court.[73]

Wrongly refusing to add the City Board of Education as a party also caused the district court to err in ordering plaintiffs to pay hourly fees and costs to the City on the grounds that "a non-party should not bear such cost."

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[72] *See United States v. Lowndes County*, 878 F.2d at 1302 (after the government's investigation revealed a network of interdistrict transfers Montgomery, Pike, Coffe, Covington, Conecuh, and Wilcox Counties and Elba City were later added as defendants for the limited purpose of considering interdistrict transfers); *Robinson v. Alabama State Department of Education*, Civ. No. 86-T-569-N (M.D. Ala. Order of Aug. 3, 1987) (adding surrounding school districts as parties defendant on the issue of interdistrict transfers).

[73] *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, Civ. No. 1974 (D.N.C. Order of Feb. 25, 1970) (See appendix at 52, *North Carolina State Ed. of Educ. v. Swann*, 402 U.S. 43 (1971)); *Benjamin v. Malcolm*, 803 F.2d 46, 53 (2d Cir. 1986); *Bradley v. School Bd. of City of Richmond*, 51 F.R.D. 139, 143 (E.D.Va. 1970).

(R1-68.) Further, with respect to the $5,188 awarded, *it is impossible to determine how many hours were spent, by whom, or what hourly rate is claimed.* (R1-92; R1-91.) In these circumstances, it was an abuse of discretion for the court to order plaintiffs to pay $5,188 to the City Board.

V. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING ADMISSION *PRO HAC VICE* TO PLAINTIFFS' COUNSEL

The district court abused its discretion in denying admission *pro hac vice* to two of plaintiffs' attorneys from the NAACP Legal Defense Fund on the ground that it would place an undue burden on the taxpayers if plaintiffs won (R1-20). First, the district court awards attorneys' fees and in its discretion can eliminate any requests that are duplicative or excessive and can set appropriate hourly rates. But, more importantly, this Court has ruled that "civil rights litigants may not be charged with selecting the nearest and cheapest attorney."[74] While plaintiffs do have well qualified local counsel, the court did not consider the arrangements between local counsel and LDF for sharing the work-load, nor plaintiffs' interest in having lawyers with special expertise in school desegregation cases. The district court's ruling was improper and an abuse of discretion.[75]

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[74] *Johnson v. University College of the University of Alabama*, 706 F.2d 1205, 1208 (11h Cir. 1983) (quoting *Dowdell v. City of Apopka, Florida*, 689 F.2d 1181, 1188 (11th Cir. 1983).

[75] *See Sanders v. Russell*, 401 F.2d 241 (5th Cir. 1968).

Conclusion

For the foregoing reasons, plaintiffs respectfully request that each of the district court's rulings challenged above be reversed and that the case be remanded for consideration of Counts I, IV, and V.

Respectfully submitted,

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Supreme Court, U.S.
FILED
SEP 24 1991
OFFICE OF THE CLERK

(2)

No. 91-346

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

TALLADEGA COUNTY BOARD OF EDUCATION, ITS INDIVIDUAL MEMBERS DAN LIMBAUGH, GAY LANGLEY, LARRY MORRIS, BEULAH GARRETT, CINDY ALLRED, AND ITS SUPERINTENDENT DR. LANCE GRISSETT,

Petitioners,

v.

QUINTON ELSTON, *et al.*, ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED BLACK CHILDREN IN TALLADEGA COUNTY, ALABAMA.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION TO CERTIORARI

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Attorneys for Respondents

Questions Presented for Review

Respondents disagree with Petitioners' characterization of the issues which are presented on the record of this matter:

1. No issue with respect to the application of Fed. R. Civ. P. 52(a) or the teaching of this Court's ruling in *Anderson v. Bessemer City*, 470 U.S. 564 (1985) (Petitioners' Questions 1 and 3) arises on this record because the Court of Appeals has neither reviewed nor set aside the findings of fact of the district court; if, on remand from the decision below, the district court reinstates its findings of fact, they will be subject to review pursuant to Rule 52(a) on any new appeal that may be taken from the district court's judgment on remand.

2. A "harmless error" issue (Petitioners' Questions 2 and 4) may be constructed on this record, but it is wholly insubstantial and does not warrant plenary review by this Court.

3. Petitioners' final "Question Presented" (No. 5) suggests a form of disposition of this matter on the merits by this Court which not only fails to justify a grant of *certiorari* (the matter of appropriate disposition following plenary review by this Court arising in every case, *see* 28 U.S.C. § 2106), but Petitioners' suggested disposition would also deny Respondents the opportunity to obtain a ruling from the Court of Appeals on the claims of legal error by the district court that they raised below but that have not yet been considered by the Court below.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-346

TALLADEGA COUNTY BOARD OF EDUCATION, ITS INDIVIDUAL MEMBERS DAN LIMBAUGH, GAY LANGLEY, LARRY MORRIS, BEULAH GARRETT, CINDY ALLRED, AND ITS SUPERINTENDENT DR. LANCE GRISSETT,

Petitioners,

v.

QUINTON ELSTON, *et al.*, ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED BLACK CHILDREN IN TALLADEGA COUNTY, ALABAMA.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF IN OPPOSITION TO CERTIORARI

Statement of the Case

This civil action was filed in 1988 challenging a number of decisions and policies of the Talladega County, Alabama Board of Education that plaintiffs claimed were racially discriminatory and violative of their rights under the First and Fourteenth Amendments to

the Constitution of the United States, Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.*, and its implementing regulations, 34 C.F.R. §§ 100 *et seq.*[1] The district court dismissed the First Amendment and pendent state claims two weeks after the complaint was filed and entered judgment in favor of the defendants following a trial in the summer of 1989 (Pet. App. A-26). Plaintiffs appealed, raising eight issues[2] involving the pre-trial dismissal of three counts of their Complaint, the post-trial ruling on the remaining claims, and the propriety of interlocutory district court rulings on the scope of discovery, admission of counsel and joinder of an additional party defendant. On April 30, 1991, the Court of Appeals held that the district court had abused its discretion in two of its interlocutory rulings, vacated the district court's judgment, and remanded the case with directions

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[1]Plaintiffs (Respondents here) also sought to pursue pendent state claims under Alabama statutory and decisional (contract) law. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 721-29 (1966).

[2]The statement of Issues Presented for review to the Court of Appeals from the Brief for Appellants below is reprinted *infra* at pp. 1a-3a.

> to grant the motion for leave to amend, grant the motion for admission *pro hac vice*, permit such additional discovery as may be necessary and conduct such additional evidentiary hearings as determined appropriate by the court.

(Pet. App. A-3.) The Court of Appeals neither sustained nor rejected the remaining claims made on appeal by the plaintiffs.

Because the issues sought to be raised in this Court by Petitioners relate to the propriety of vacating and remanding the case to the trial court on the basis of the interlocutory errors identified by the Court of Appeals, Respondents will not describe the underlying factual controversy in this case, nor summarize the reasons why we believe the district court's factual findings and judgment were incorrect. We do wish to make clear, however, that Respondents disagree vigorously with the Board of

Education's characterization of the merits and of the evidence.[3]

Reasons Why The Writ Should Be Denied

No issues of substance warranting plenary consideration of this case in its present posture are raised

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[3]The most flagrant misrepresentation of the evidence made by the Board appears at pp. 5-6 of the Petition, where it is suggested that

> [o]ne of the main issues was the Board's elementary school plan; during the trial the *plaintiffs'* expert admitted on cross-examination that this plan was ". . . a good plan . . . a pretty good plan."

The "elementary school plan issue" to which Petitioners refer was the Board's decision to *close* the elementary grades of the Talladega County Training School and reassign pupils in those grades to a new facility to be constructed. The cross-examination testimony of plaintiffs' expert witness that is excised and quoted in the Petition had to do with the *remodeling* to be done at the Training School *following* the transfer of the elementary grades; the complete response of the witness is set forth below:

> THE COURT: What's a good plan?
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> THE WITNESS: That they've got a good start on remodeling for a K through -- for a seven through twelve junior/senior high school at the Talladega County Training School site. The plan I saw this morning looks like a pretty good plan. It's a beginning. I don't think it is going to do the whole job as we've already mentioned that.

(Tr. 418.)

by Petitioners. In particular, none of the considerations supporting the granting of *certiorari* to which this Court has directed the attention of practitioners, *see* Sup. Ct. R. 10, are implicated by the ruling below.

1. Petitioners seek to construct an argument based upon Fed. R. Civ. P. 52(a) and this Court's decision in *Anderson v. Bessemer City*, 470 U.S. 564 (1985). However, the Court below did not "vacate" or "set aside" the district court's findings of fact nor restrict the district court's ability on remand to find the same facts, if that is warranted.[4] Unlike in the cases cited by Petitioners, the Court of Appeals neither discussed the factual evidence nor articulated a view of the proof different from that described by the district court.[5] In no sense was the Court of Appeals' *judgment* grounded upon an interpretation of the

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[4]See the remand directions of the Court of Appeals quoted *supra* p. 3 and set out at Pet. App. A-3.

[5]*See Anderson v. Bessemer City*, 470 U.S. 564 (1985); *Pullman-Standard v. Swint*, 456 U.S. 273 (1982). In *Cooter & Gell v. Hartmarx Corporation*, 496 U.S. ___, 110 L. Ed. 2d 359 (1990), also cited by Petitioners, this Court reviewed and summarized its holdings in *Bessemer* and *Swint* in the course of affirming a Court of Appeals ruling that had applied them on an appeal from the imposition of sanctions under Fed. R. Civ. P. 11.

factual record on the merits of plaintiffs' claims, much less upon such an interpretation reached without proper consideration of Rule 52 and this Court's decisions. Thus, granting the writ in this matter will not bring any Rule 52 issues before this Court. *See* Sup. Ct. Rule 15.1.

2. Petitioners' "harmless error" arguments are equally unavailing. Plaintiffs were denied the right to litigate this case with counsel of their choice[6] and to seek relief against a party whose involvement in some of the claimed discriminatory practices was revealed during the process of discovery. These errors had an impact upon the district court's ruling,[7] and the Court below remanded so that the trial court might reconsider its ruling after correcting those

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[6]The district court limited the admission *pro hac vice* of out-of-state counsel to one attorney. *See Sanders v. Russell*, 401 F.2d 241 (5th Cir. 1968).

[7]For example, the district court denied relief sought by plaintiffs with respect to "zone jumping" on the ground, *inter alia*, that the Talladega County Board of Education had "few, if any, avenues available to it" to prevent other districts from accepting County school district residents into their systems (Pet. App. A-22 - A-23 ¶¶ 22-23). Plaintiffs sought to join one such receiving district, the Talladega City district, as a party, and to obtain relief from the Court that would restrict "zone jumping" from County schools to City schools.

errors. That is quite different from *McDonough Power Equipment v. Greenwood*, 464 U.S. 548 (1984), the case principally relied upon by Petitioners, because the Court of Appeals' decision in *McDonough*, unlike the ruling below, *compelled* a new trial.[8] In any event, the decision below (finding abuses of discretion by the district court and vacating its judgment to allow correction of these errors) is dependent upon the unusual and highly particular facts of this case. It neither conflicts with other Courts of Appeals' decisions nor presents a situation likely to be often repeated and so demanding the plenary attention of this Court.

3. Finally, Petitioners' suggestion that review is warranted in order that this Court may consider whether to "reinstate the judgment of the District Court," *see* Pet. at i, 12, is nonsense. By definition, the question of what should be the disposition of a judgment given plenary

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[8]Similarly, the criminal decisions cited by Petitioners involved a Court of Appeals ruling requiring retrial, *United States v. Lane*, 474 U.S. 438 (1986), and a district court ruling dismissing an indictment, *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988). Furthermore, *McDonough* presented significant questions about the manner of selecting juries in federal civil suits, an important factor supporting this Court's grant of review in that case which is lacking here.

review by this Court, *see* 28 U.S.C. § 2106, furnishes no independent ground for review separate from the existence of some other meritorious question arising in the case. Indeed, "questions presented" that will merit review by this Court must necessarily involve issues *decided* by a lower court. *See* Sup. Ct. Rule 10. But nothing in the Court of Appeals' decision here speaks to the matter of disposition by this Court following a decision to grant review.

Even more serious, the disposition suggested by Petitioners would deny Respondents' right to the appellate review provided by 28 U.S.C. § 1291. As noted above, Respondents presented three kinds of issues to the Court of Appeals in this case: (a) questions as to the propriety of the district court's pre-trial dismissal of some of the claims raised in their Complaint; (b) questions as to the propriety of the district court's interlocutory rulings on, *inter alia*, admission of counsel *pro hac vice* and joinder of an additional party defendant; and (c) questions about the correctness of the district court's judgment rendered after trial on the remaining claims in the Complaint. The Court

below held that the district court had abused its discretion in making two rulings in category (b) and vacated its judgment with directions for further proceedings. It did not reach the issues in category (a) or category (c), inasmuch as it was clearly unnecessary to do so in light of its remand. Hence, should the district court reinstate its rulings following completion of the remand proceedings, the issues in categories (a) and (c), as well as the undecided issues in category (b), may be raised on a subsequent appeal.

Petitioners' suggested disposition of this matter -- having this Court reinstate the district court's judgment -- would deny Respondents the right to obtain appellate review of these issues[9] and would raise grave questions of due process. If Petitioners are entitled to anything, they are entitled at best to a remand to the Court of Appeals so that the remaining questions raised on Respondents' appeal may be considered and adjudicated. *See, e.g., Blatchford v.*

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[9]Clearly, an attempt by Respondents to raise such issues by petitioning for *certiorari* from the judgment below would have foundered for the simple reason that none of the questions that would be sought to be presented for review have been *decided* below.

Native Village of Noatak, 501 U.S. ___, ___, 115 L. Ed. 2d 686, 700 (1991)("The Court of Appeals of course did not address this point, and we leave it for that court's initial consideration on remand"); *NLRB v. Erie Resistor Corporation*, 373 U.S. 221, 237 (1963)("We reverse the judgment of the Court of Appeals and remand the case to that court since its review was a limited one and it must now reach the remaining questions before it"); *cf.*, *e.g.*, *Johnson v. Home State Bank*, 501 U.S. ___, ___, 115 L. Ed. 2d 66, 77 (1991)("neither court addressed the issues of good faith or feasibility. We also decline to address those issues and instead leave them for consideration on remand").

Conclusion

For the foregoing reasons, the writ should be denied.

Respectfully submitted,

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APPENDIX

In the
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
Nos. 89-7777 and 89-7917

QUINTON ELSTON, et al.,

Plaintiffs-Appellants,

vs.

TALLADEGA COUNTY BOARD OF EDUCATION, et al.,

Defendants-Appelleees.

On Appeal from the United States District Court
for the Northern District of Alabama

BRIEF FOR APPELLANTS

* * *

Issues Presented

1. Whether the district court erred in ruling, with respect to Count II under the Fourteenth Amendment, that plaintiffs had not by a preponderance of the evidence shown that any of the challenged decisions or practices were tainted by discriminatory intent.

2. Whether the district court erred in ruling, with respect to Count III under Title VI of the Civil Rights Act of 1964, and the regulations promulgated thereunder, that

plaintiffs had not established a prima facie case that any of the challenged practices had a disparate impact on blacks and that defendants had shown legitimate, non-discriminatory reasons for the decisions and practices in question.

3. Whether the district court erred in refusing to require defendants to provide discovery regarding any matter prior to school year 1985-86.

4. Whether the district court erred in dismissing Count I of the Complaint for breach of contract on the ground that enforcement of an agreement made in a related case could be pursued only in that litigation, although that litigation had been dismissed.

5. Whether the district court erred in dismissing without explanation Count IV of the Complaint challenging as violative of the First Amendment the Board of Education's policy precluding the recording "in any manner" of its public meetings.

6. Whether the district court erred in refusing to exercise pendent jurisdiction over Count V under Ala. Code

§ 36-12-40 for defendants' refusal to provide plaintiffs with copies of public documents.

7. Whether the district court erred in denying plaintiffs' motion to add Talladega City Board of Education as a party on the interdistrict transfer claim and in awarding the Talladega City Board of Education $5,188 for complying with a discovery subpoena.

8. Whether the district court erred in denying admission pro hac vice of two attorneys for plaintiffs from the NAACP Legal Defense Fund on the ground that if plaintiffs prevailed it would place an undue burden on the taxpayers of Talladega County.